

Human Rights and the Criminalisation
of Consensual Same-Sex Sexual Acts
In the Commonwealth, South and Southeast Asia

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The South and Southeast Asia Resource Centre on Sexuality

SUMMARY

This working paper draws attention to the criminalisation of consensual same-sex sexual acts in South and Southeast Asia and the possible role the Commonwealth and the Foreign and Commonwealth Office (FCO) of the United Kingdom can play in undoing the criminalisation.

The criminalisation of consensual same sex sexual acts has been a subject of judicial review in different fora in different countries. In different cases, the European Court of Human Rights and the United Nations Human Rights Committee have held that these laws violate the right to privacy. The US Supreme Court has held that such a law violates the right to liberty. The Constitutional Court of South Africa has held that such a law violates the rights to privacy, equality, and human dignity.

The Yogyakarta Principles (relating to sexual orientation and gender identity) call upon all states to repeal all laws that criminalise consensual sexual activity among persons of the same sex who are over the age of consent.

In light of pressing human rights concerns, a global review of these laws is entirely worthy. In this paper however, a selective focus is invited to South and Southeast Asia. In this region, Bangladesh, Bhutan, Brunei, India, Malaysia, Maldives, Myanmar, Nepal, Pakistan, Singapore, and Sri Lanka (a total of 11 countries) have such laws. Eight of these are Commonwealth countries. They share a common forum – the Commonwealth – for mobilising dialogue and action on the subject.

These countries have a shared history of British colonisation. The criminalisation is a direct reflection of Victorian period law-making in what was then the British Empire. In 2007, in an unprecedented statement the British Foreign Office Minister Ian McCartney affirmed “Britain’s commitment to the universal decriminalisation of homosexuality”.

The Commonwealth and the United Kingdom – together and separately – offer promising potential for undoing the criminalisation, not just in the region but also across the world. There needs to be greater demand and targeted lobbying to turn this potential into action.

Sumit Baudh is the Senior Programme Associate at the South and Southeast Asia Resource Centre on Sexuality (TARSHI). A graduate of the National Law School of India University, Bangalore (BA LLB, 1998), a recipient of the British Chevening Scholarship (2001), Sumit obtained his Master of Laws (LLM) from the London School of Economics (2002) and qualified as Solicitor (non-practicing), England and Wales (2004). He has worked with the Commonwealth Human Rights Initiative (2003-04) and the AMAN Trust (2004–06), both NGOs based in India. In his personal capacity Sumit has been involved in social movements and campaigns, particularly the Voices Against 377. His areas of interest include human rights, sexuality, conflict, new religious movements, and caste.

He says, I presented on Section 377 of the Indian Penal Code at a conference organised by the Expert Group on Development Issues (EGDI) of the Swedish Ministry for Foreign Affairs (MFA) on 6th April 2006 in Stockholm. The discussant for my paper, a human rights specialist within the Swedish MFA, Ms Ulrika Sundberg endorsed my position to the extent that Section 377 is a source of grave human rights violations, and that it should be removed. She also pointed out that a number of countries worldwide have similar laws; of these, many are Commonwealth countries. She then wondered aloud if the ‘former empire should do something about it’. This triggered the thought in my mind. Now, after two years, it has taken the shape of this working paper. I hope it will trigger many more thoughts, and more significantly, concrete action on undoing the criminal sanctions against consensual same-sex sexual acts worldwide on an urgent basis.

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INTRODUCTION

Many countries, the world over, have laws that criminalise consensual sexual activity among persons of the same sex. These laws are differently worded as gross indecency, buggery, debauchery, carnal intercourse against the order of nature, but are more commonly known as *sodomy laws*.

These laws affect almost everybody – if not in the practice of being charged but in the societal attitudes that follow. No doubt they bear serious implications for same-sex desiring people, including those who identify as lesbian, gay, bisexual, transgender (LGBT), *hijras*, *kothis*, and many others. The laws present a serious threat to HIV prevention initiatives aimed at, for example, men who have sex with men (MSM). The laws also affect attitudes towards certain sexual acts like anal sex, regardless of who is committing them, heterosexual or homosexual.

In 2008, no less than 86 member states of the United Nations (UN) still criminalize consensual same sex acts among adults.¹ Of these, nearly 50% (as many as 41) are in the Commonwealth. Within the Commonwealth 41 out of 53 countries makes it 77%. This percentage is much lower within the UN – 86 out of 192 countries makes it 45%. It is even lower in the non-Commonwealth UN, 32%.² These statistics show that sodomy laws exist in a larger part of the Commonwealth (77%) than the non-Commonwealth (32%).

A global review of such laws is entirely worthy. In this paper however, a selective focus is invited to South and Southeast Asia. In this region, Bangladesh, Bhutan, Brunei, India, Malaysia, Maldives, Myanmar, Nepal, Pakistan, Singapore, and Sri Lanka

¹ Ottosson, D, *State-sponsored Homophobia - A world survey of laws prohibiting same sex activity between consenting adults*, International Lesbian and Gay Association (ILGA), May 2008; available on line: http://www.ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2008.pdf

² (86 – 41 =) 45 out of (192 - 53 =) 139 | 45 out of 139 = 32%

(a total of 11 countries) have laws that criminalise consensual sexual activity among persons of the same sex.

Section 377 of the Indian Penal Code, titled *Unnatural Offences* penalises what it calls “carnal intercourse against the order of nature”. There are numerous incidents in India in which the use of Section 377 has had worrying consequences. In January 2006, four men were arrested in Lucknow - without any instigation or complaint. The police traced the phone number of one of the accused on a gay website, and met him under-cover. The police then forced him to call several of his friends, three of whom actually turned up. All four were arrested. In this sting-operation, innocent persons were thus prosecuted only because of their perceived sexual identity.³ This was not the first such incident. One can easily recall the arrest of NGO staff (Naz Foundation International/Bharosa Trust) working on HIV/AIDS awareness in Lucknow in 2001. The work of the NGO with MSM was dubbed as a ‘gay racket’ and viewed as ‘promoting homosexuality’. This incident presented a serious setback to HIV/AIDS outreach work all over the country.

³ From an unpublished fact finding report written by Elavarthi Manohar of the National Campaign on Sexuality Rights (NCSR), Tulika Srivastava of the Association for Advocacy and Legal Initiatives (AALI), Lucknow, Jashodhara Dasgupta of Sahayog, Lucknow, Maya Sharma of Parma, Baroda, Vivek Divan a human rights lawyer from Mumbai, and Arvind Narrain of the Alternative Law Forum, Bangalore. Some of the on-line published reports of the incident can be accessed at: <http://hrw.org/english/docs/2006/01/11/india12398.htm>
http://www.ilga.org/news_results.asp?LanguageID=1&FileCategory=1&ZonelD=3&FileID=734

This paper is aimed at drawing attention to the possible role of the Commonwealth and the Foreign and Commonwealth Office (FCO) of the United Kingdom in undoing the criminalisation of consensual same-sex sexual acts.

The paper presents itself on these lines: first there is a brief description of the nature of criminalisation in the region, followed by broad human rights arguments that challenge the criminalisation, and finally the role the Commonwealth and the FCO can play.

I

THE CRIMINALISATION

Not all countries in the region have the criminalisation. Even those that do, do not have it on identical terms. The most common version that emerges is titled *Unnatural Offences, and reads thus:*

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.⁴

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⁴ Section 377, Indian Penal Code (IPC) 1860.

A plain reading of the law reveals little and is actually quite ambiguous. To begin with, what does “carnal intercourse against the order of nature” mean? (For ease of reference I have used the acronym CIATON. The case law from India makes frequent references to bestiality, buggery and Biblical notions of the sin of Gomorrah and the sin of Sodom. That in itself is of little help. The meaning of sodomy has varied across centuries, continents, and cultures.⁵ Even its legal interpretation has varied from one jurisdiction to another.

Then how does one begin to understand the offence? There is a hint in the statutory explanation. It states that “penetration” is sufficient to constitute carnal intercourse, but does not clarify penetration *of what* and *by what*? From a reading of the Indian

⁵ “In various times and places everything from the ordinary heterosexual intercourse in an atypical position to oral contact with animals.” Boswell J., *Christianity, Social Tolerance and Homosexuality: Gay people in Western Europe from the beginning of the Christian era to the fourteenth century*, University of Chicago Press, Chicago (1980), p. 93

⁶ *Lohana, Vasanthlal, Devchand v. State*, AIR 1968 Gujarat 252

⁷ *Brother John Anthony v. The State*, 1992 CriLJ 1352

⁸ Narrain A, *Queer: Despised Sexuality, Law and Social Change*, Books for Change, Bangalore (2004), p. 55

case law, it appears that penile penetration (of the anus or the mouth) is what is being alluded to.⁶ Even penile masturbation of one person by another is considered ‘penetration’.⁷

A study of Indian judgments under Section 377, a total of 46 cases, reveals that 30 cases (65%) deal with child sexual abuse by men. Of the 30 cases, 20 involve male children and 10 involve female children.⁸ Even in those cases that do involve consenting adults, there is no judicial discussion over the element of consent. Some men in these cases are called “habitual sodomites/catamites” but the judgments are emphatic that prior sexual history, or the fact that the accused male wore female attire is of no relevance.

Gender and sexuality have thus found little open articulation in the Indian judicial discourse. It is consistently and implicitly held that *only* penile-vaginal penetration (that bears the potential of procreation) conforms to the stated order of nature.

The law does not mention homosexual or heterosexual, or lesbian or gay for that matter. It is facially neutral, that is, on the face of it appears to penalise *whoever*: homosexual, heterosexual, man or woman.

⁹ Ottosson, D, *Supra*, 1; Narrain A & Dutta B, *Male-to-male sex, and sexuality minorities in South Asia: An analysis of the politico-legal framework*, Naz Foundation International, 2006; Sanders D, *Human Rights and Intervention Programs for Males Who Have Sex With Males: Southeast Asia and East Asia*, 2006; and <http://www.sodomylaws.org/>

The table below gives a summary of the criminalisation of same-sex sexual acts in the region. The information is gathered from varied sources.⁹

NOTES:

- |=| Terms of the law identical to CIATON (see box above).
 |+| Imprisonment up to 10 years, may extend to life, also liable to fine
 FN Facially neutral

COUNTRY	TERMS OF PENALISATION	PENALTY	SUBJECTS
Bangladesh	=	+	FN
Brunei	=	Imprisonment up to 10 years, also liable to fine.	FN
India	=	+	FN
Pakistan	377: Unnatural Offences, CIATON	Minimum imprisonment up to 2 years, max 10 years, also liable to fine.	FN
Singapore	377A: Outrages on decency: gross indecency in public or in private	Maximum 2 years imprisonment	Only male to male
Sri Lanka	(1) 365: CIATON, inclusive of bestiality (2) 365A (1995): gross indecency in public or in private	(1) Maximum 10 years (2) Maximum 2 years imprisonment or fine or both; higher penalty for offence with minor (<18)	FN
Malaysia	377A: Unnatural Offences, CIATON, sexual connection with another person by the introduction of the penis into the anus or mouth of the other person, "Penetration", a sufficient ingredient 377C: without consent 377D: Outrages on decency: gross indecency in public or in private	377B: Imprisonment may extend to twenty years, also liable to whipping.	FN
Maldives	<i>Exact status not known due to contradictory accounts:</i> (1) Sharia Law: Sexual acts between men and between women; (2) =	(1) For men: banishment for 9 months to 1 year or a whipping of 10 to 30 strokes; for women: house arrest for 9 months to 1 year; (2) +	Only same sex sexual acts (male & female).
Bhutan*	213: Unnatural sex: sodomy, sexual conduct against the order of nature	Petty misdemeanor, maximum imprisonment of less than 1 year & a min term of 1 month	FN
Myanmar*	377: Unnatural Offences, CIATON, inclusive of bestiality	+	FN
Nepal*	Unnatural sexual intercourse. Plus other specific provisions on bestiality (not included here)	Imprisonment up to 1 year or five thousand rupees	FN

*Not Commonwealth countries.

The situation in each of these countries is unique and deserves attention at greater length. But the information is not easy to come by. Snippets of information are available by way of institutional reports or newspaper articles. For example, according to a newspaper report, the law enforcement agencies in Bangladesh interfere and harass MSM using the section 377 of the Penal Code.¹⁰

¹⁰ *Change mindset to ensure rights of MSM people in society*, The Daily Star, 28 Feb 2008; also available on-line: <http://www.thedailystar.net/story.php?nid=25318>

¹¹ *Law, Ethics and Hiv/Aids in South Asia: A study of the legal and social environment of the epidemic in Bangladesh, India, Nepal and Sri Lanka*, UNDP, at p.19; available on-line: <http://www.undp.org/hiv/docs/alldocs/Asia%20-%20Law,%20Ethics%20and%20HIV-AIDS%20-%20Study%20of%20the%20Legal,%20Social%20Environment%20of%20Epidemic%20in%20Bangladesh,%20India,%20Nepal%20and%20Sri%20Lanka.pdf>

¹² Fernando M, *Vagrant voices*, Himal Southasian, Vol 21 No 3 Mar 2008, p. 37; also available on-line: http://www.himalmag.com/2008/march/cover_sri_lanka_gay.htm

¹³ *Singapore retains its gay sex ban*, BBC News, 23 Oct 2007; also available on-line: <http://news.bbc.co.uk/2/hi/asia-pacific/7059300.stm>

In Sri Lanka, up until 1995, the terms of the criminalisation applied to men only, but a movement to raise awareness on the need to reform the law led to it being made gender neutral. “[I]t was pointed out that the wording of the existing “anti-homosexual” provision referred only to “man”, and that this was discriminatory. Therefore, the word “person” was used to replace “man”, resulting in legislation that criminalises both men and women for same sex sexual activity. In this way, the introduction of a bill aimed at decriminalising homosexual conduct between men ultimately resulted in a widening of the scope of the original law”, states a UNDP report.¹¹ Now, women too come under the ambit of the law, and for the past 13 years, consensual sex between women has been criminalised.¹²

More recently, in October 2007 the chamber in Singapore passed a bill legalising oral and anal sex for the first time, but only those that are heterosexual acts. This is explicitly discriminatory against same sex desiring people. Section 377A in Singapore remains a valid law. Under the legislation, a man caught committing an act of “gross indecency” with another man could still be jailed for up to two years. Singapore’s parliament voted against a proposal to decriminalise sex between men. Prime Minister Lee Hsien Loong was quoted as saying, Singapore was a conservative society, and he wanted to keep it so.¹³

Nepal criminalises ‘unnatural sex’ in ambiguous terms. Located amidst provisions that criminalise sex with animals, the application of unnatural sex to same-sex sexual acts is not very clear. Based on a commonality with its counterpart legislations in

the region, it resonates with CIATON. In response to a petition filed by a coalition of local lesbian, gay, bisexual, transsexual and inter-sex (LGBTI) rights groups, on 21 December 2007 the Supreme Court of Nepal has ordered the government “to formulate appropriate legislation or amend existing legislation” in order to end discrimination against the LGBTI community in the country.¹⁴ Exemplary in its spirit to protect the human rights of LGBTI persons in Nepal, the application of this order remains to be seen. There is the administrative task now of evaluating all existing Nepali laws that are discriminatory, of which the law that criminalises unnatural sex could be one.

The criminalisation in India is presently undergoing a judicial scrutiny. The currently pending Writ Petition of 2001, in the Delhi High Court has emerged in the context of the criminalisation being an obstruction to carrying out HIV/AIDS outreach work amidst MSM. Broadly it relies on rights to privacy, equality and human dignity. It includes arguments to the effect: (i) that the law is ‘arbitrary’ in its classification of natural and unnatural sex; and, (ii) that it causes a serious setback to HIV/AIDS outreach work, thus violating the right to life. Before it could be taken up on its merits, the Delhi High Court dismissed the case on the preliminary grounds that there was no cause of action and that the Petitioner NGO had no *locus standi*. However the Supreme Court of India in an appeal, later set aside the dismissal and sent it back to the High Court where it is now slated for final arguments. It would be entirely speculative to comment any further on the outcome of the litigation. Until it is decided (hopefully favourably), the human rights – of LGBT and the non-LGBT people alike – are flouted with impunity in India.

¹⁴ Diwas Kc, *The state of homosexuality*, Himal Southasian, Vol 21 No 3 Mar 2008, p. 23; also available on-line: http://www.himalmag.com/2008/march/cover_state_of_homosexuality.htm

II

JUDICIAL SCRUTINY OF HUMAN RIGHTS

Sexual conduct is a private matter in which the state should not interfere. *Dudgeon v. United Kingdom* (hereinafter *Dudgeon*) is a milestone in the judicial interpretation of ‘right to respect for... private... life’ in Europe. There was a police investigation into the personal affairs of the male petitioner, Dudgeon. The exact purpose of the investigation remained ambiguous because criminal charges were never actually framed. It was clear that the investigation was aimed at identifying Dudgeon’s sexual activity with other men. Acts likely to have been committed by him were similar to CIATON.¹⁵

¹⁵ Under Section 61 and 62 of the Offences against the Person Act 1861, committing and attempting to commit buggery were made offences punishable with maximum sentences of life imprisonment and ten years’ imprisonment, respectively.

Most complaints prior to *Dudgeon* came from Germany, and the European Court of Human Rights had so far found no breach of Article 8 of the European Convention on Human Rights. In a total reversal of its previous views, the European Court declared Dudgeon’s complaints concerning the *buggery* law in Northern Ireland to be admissible in 1978. The Court held that UK was in breach of Article 8 of the European Convention because the impugned legislation constituted a continuing interference with the applicant’s right to respect for his private life (which includes his sexual life).¹⁶

¹⁶ *Dudgeon v. United Kingdom*, (1981) Ser. A, No. 45, see para 41.

The European Court also considered: whether or to what extent the legislation was “necessary in a democratic society for the protection of morals.” For this purpose, the Court referred to the report of the Wolfenden Committee on Homosexual Offences and Prostitution (1957). The Court acknowledged differences in understanding of male ‘homosexuality’ in the late twentieth century as compared with the mid-nineteenth.

Not too long after *Dudgeon* followed *Norris v. Ireland*

(hereinafter *Norris*).¹⁷ *Norris* applied to the European Commission on Human Rights in 1983 complaining of the laws that criminalised male homosexual activity.¹⁸ He complained that under the impugned law he was liable to criminal prosecution on account of his homosexual conduct. He alleged that he had suffered, and continued to suffer, unjustified interference with his right to respect for private life, in breach of Article 8 of the European Convention. The case was decided by the European Court of Human Rights in 1988. Confirming its reasoning in the *Dudgeon* case, the European Court found that the impugned legislation interfered with *Norris*'s right to respect for his private life. It expanded the definition of 'victim' because *Norris* was not even subjected to a police investigation and yet his case was admitted based only on an apprehension that he might be prosecuted.

The European Court also looked at the justifiability of criminal sanctions (under Article 8, Para 2) and reiterated that "every 'restriction' imposed in this sphere must be proportionate to the legitimate aim pursued".¹⁹ It relied on *Dudgeon* and held that there was no *pressing social need* to make such acts criminal offences. On the issue of proportionality, the European Court reiterated that a justification for retention of criminalisation was "outweighed by the detrimental effects... on a person of homosexual orientation..."²⁰ It was held that there was indeed a breach of Article 8 of the Convention.

Language of the impugned law in both *Dudgeon* and *Norris* differs from CIATON, in so far as the impugned offence was *buggery*. An offence closest in similarity to CIATON was challenged a few years after *Norris*, in *Modinos v. Cyprus* (hereinafter *Modinos*).²¹ Another remarkable similarity with CIATON is that the impugned legislation in *Modinos* was framed during the country's colonial occupation and hence predated the Constitution of Cyprus.

Modinos complained that "the prohibition on male homosexual

¹⁷ *Norris v. Ireland*, (1988), Ser. A, No. 142.

¹⁸ Sections 61 and 62 of the offences against the persons Act, 1861, as amended in 1892, prohibited *buggery, committed either with mankind or with any animal*.

¹⁹ *Supra*, 17, see para 44.

²⁰ *Dudgeon*, cited in *Norris*, *Supra*, 16, see para 46.

²¹ *Modinos v. Cyprus*, (1993), Ser. A, No. 259; Challenging Section 171 of the criminal code of Cyprus that prohibited *carnal knowledge of any person against the order of nature*.

activity constituted a continuing interference with his right to respect for private life in breach of Article 8 of the European Convention.” Like *Norris, Modinos* was never subjected to any police investigation. As also, the Attorney General of Cyprus had declared a policy *not* to initiate prosecution under the impugned law. The European Court held that a policy of non-prosecution was irrelevant because it provided no guarantee that action will not be taken by a future Attorney General; and therefore the impugned legislation continuously and directly affected the applicant’s private life. It was held that there was a breach of Article 8 of the Convention.

²² *Toonen v. Australia*, (Communication No. 488/1992) U.N. Doc CCPR/C/50/488/1992 (1994)

Similar such criminalisation came up for consideration before the United Nations Human Rights Committee in *Toonen v. Australia* (hereinafter *Toonen*).²² The Committee examined whether the impugned law violated Article 17 of the International Covenant of Civil and Political Rights (ICCPR) by arbitrarily and unlawfully interfering with the privacy of the petitioner, Toonen. The Committee referred to *Dudgeon, Norris* and *Modinos* and reiterated that the impugned law was indeed not necessary for the ‘protection of morals.’ It interpreted “reasonableness” to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances.²³ The Committee rejected the argument that such laws prevented the spread of HIV/ AIDS.²⁴ The judgment is useful for challenging the criminalisation in those countries that are signatories to the ICCPR.

²³ *Ibid*, see para 8.3.

²⁴ *Ibid*, see para 8.5.

The Constitutional Court in South Africa decriminalised the common law offence of sodomy and Section 20A of the Sexual Offences Act in 1998 in *National Coalition for Gay and Lesbian Equality v. The Minister of Justice* (hereinafter the *National Coalition* case).²⁵ In para 32 of the judgment, Ackermann J. states: “Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression

²⁵ 1999 (1) SA 6, at <http://www.saflii.org/za/cases/ZACC/1998/15.html>

to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.” The judgment acknowledges the case law from other jurisdictions, *Dudgeon*, *Norris*, and *Toonen*.²⁶ This case gains special significance in this paper not only for its exemplary interpretation of human rights but also because South Africa is a member of the Commonwealth (so is Cyprus).

In 2003, in *Lawrence v. Texas* (hereinafter *Lawrence*) the US Supreme Court struck down the Texas law that made it a crime for two persons of the same sex to engage in certain intimate sexual conduct.²⁷ The police entered the apartment of Lawrence in response to a reported weapons disturbance. They saw Lawrence and another man having anal sex. Both men were arrested, charged and convicted for “[d]eviate sexual intercourse”. They were both adults at the time of the alleged offence. Their conduct was entirely consensual. They challenged the penalisation as a violation their fundamental human rights. The US Supreme Court held that that “[t]heir right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”

In 2005 the High Court of Fiji in *McCoskar v. The State* (hereinafter *McCoskar*), struck down the Fijian sodomy laws as unconstitutional in so much as they applied to private and consensual sexual acts among persons who are 18 years and older.²⁸ Two adult men were charged with Sections 175 and 177 of the Fijian Penal Code.²⁹ The judgment acknowledges that the origin of these laws “can be traced to England. They were copied faithfully throughout the old British Empire and inherited by Fiji.” The judgment also states that “while members of the public who regard homosexuality as amoral may be shocked, offended or disturbed by private homosexual acts, this cannot on its own validate unconstitutional law. The present case concerns the most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before the State or community can

²⁶ *Ibid*, see Paras 40–55.

²⁷ *Lawrence v. Texas*, 539 U.S. (2003), at <http://www.supremecourtus.gov/opinions/02pdf/02-102.pdf>

²⁸ *McCoskar v. The State*, [2005] FJHC 500, <http://www.paclii.org/fj/cases/FJHC/2005/500.html>

²⁹ As quoted in *McCoskar v The State*, *Ibid.*: Section 175. Any person who – (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony, and is liable to imprisonment for fourteen years with or without corporal punishment. | Section 177. Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony, and is liable to imprisonment for five years, with or without corporal punishment.

interfere with an individual’s right to privacy.”

The judgment of the High Court of Fiji relied on Article 17, ICCPR, referred to the views of the philosopher John Stuart Mill, and quoted from the Wolfenden Committee report. It also took into consideration *Dudgeon*, *Toonen*, and *Lawrence*. The judgment notes that “right to privacy [is] so important in an open and democratic society that the morals argument cannot be allowed to trump the Constitutional invalidity. Criminalising private consensual adult sex acts against the course of nature and sexual intimacy between consenting adult males is not a proportionate or necessary limitation.”

In addition to privacy, another human right that deserves attention is the right to equality. *Commonwealth of Kentucky v. Jeffrey Wasson* (hereinafter *Wasson*) was decided in the US in 1993. *Wasson* was charged with “soliciting” an offence of “deviate sexual intercourse with another person of the same sex” with an undercover police officer. The sexual activity was intended to have been between consenting adults within the privacy of *Wasson*’s home. *Wasson* challenged the constitutionality of the offence based on his rights – to privacy and equal treatment – under the Kentucky Constitution.³⁰

³⁰ *Commonwealth of Kentucky v. Jeffrey Wasson*, 842 SW 2d 487 (Ky 1992).

The impugned law in *Wasson* was discriminatory on the face of it because it *only* prohibited “deviate sexual intercourse with another person of the *same sex*.” The Court compared the two sexual-orientation identities - heterosexuals and homosexuals, and asked the question: “... whether a society that no longer criminalizes adultery, fornication, or deviate sexual intercourse between heterosexuals, has a rational basis to single out homosexual acts for different treatment.”³¹ It evaluated the *rational basis*, if at all, for discriminating between the two groups, and said that simply because a majority of people, speaking through the legislature, find one type of extramarital intercourse more offensive than another, does not provide a *rational basis* for criminalising the sexual preference of homosexuals.³²

³¹ *Ibid*, see majority opinion, third last para.

³² *Ibid*, see majority opinion, last para.

The Court extensively quoted from the philosophy of John Stuart Mill's *On Liberty* and arrived at a non-interventionist role of the state in consensual sexual activity between adults. The court concluded that it is *arbitrary* for the majority to criminalise sexual activity solely on the basis of majoritarian sexual preference, and in the absence of a rational basis, it violates *equal treatment* under the law.

The *National Coalition* case also acknowledged the possibility of more than one sexual orientation.³³ It relied on Section 9 of the 1996 Constitution of South Africa, which, unlike the European Convention and the US constitution, explicitly prohibits sexual orientation discrimination. It accorded a status of political minority to gays and lesbians.³⁴ Discrimination caused by criminalisation was held to be unjust, *inter alia*, on the ground that gays are a disfavoured minority group;³⁵ and also because it violated right to dignity enshrined in Section 10 of the South African Constitution. The Constitutional Court in South Africa acknowledged sexual conduct as a “part of their [gay men’s] experience of being human” and held the criminalisation to be an “invasion of their dignity.”³⁶

Closely following the *National Coalition* case but very different in its conclusion is *Banana v. The State* which was decided in Zimbabwe in 2000 (hereinafter *Banana*).³⁷ Zimbabwe was at that time a member of the Commonwealth,³⁸ and hence this case has particular relevance. The impugned offence was the common law crime of sodomy, “unlawful intentional sexual relations per anum between two human males”. Intercourse per anum by a man with a woman is not an offence. A consensual sexual act between women is not an offence. Only male-male sexual acts are of criminal concern in Zimbabwe.³⁹ The following excerpt from EK Quansah’s article (published in the African Human Rights Law Journal) summarises the Zimbabwean judgment in *Banana*.

³³ *Ibid.*, see Para 20.

³⁴ *Ibid.*, see Para 25 and 26 (a).

³⁵ *Ibid.*, see Para 27 (also see Para 16 for a reference on *disfavoured group*).

³⁶ *Ibid.*, see Para 28.

³⁷ (2000) 4 LRC 621 (ZSC).

³⁸ Zimbabwe was suspended from the Commonwealth in 2002 after a Presidential election that was seen as flawed. President Mugabe took Zimbabwe out of the Commonwealth in 2003, after the Commonwealth announced plans to extend the suspension. See *UK eyes Zim for Commonwealth*, News24.com, South Africa, 02/04/2008, http://www.news24.com/News24/Africa/Zimbabwe/0,,2-11-1662_2298648,00.html; also see, *Zimbabwe quits Commonwealth*, BBC, UK, 08/12/2003, <http://news.bbc.co.uk/2/hi/africa/3299277.stm>

³⁹ Sanders D, unpublished notes.

The appellant was a former non-executive president of Zimbabwe. He was convicted, inter alia, on two counts of sodomy by the High Court. He appealed against the conviction to the Supreme Court. The Court had to decide whether, amongst others, the common-law crime of sodomy was in conformity with section 23 of the Zimbabwean Constitution, which guaranteed protection against discrimination on the ground of gender.

The [Supreme Court of Zimbabwe] held that section 23 of the Constitution did not include an express prohibition against discrimination on the ground of sexual orientation. That provision prohibited discrimination between men and women, not between heterosexual men and homosexual men. The latter discrimination was prohibited only by a constitution which proscribed discrimination on the grounds of sexual orientation. The real complaint by homosexual men, in the majority's view, was that they were not allowed to give expression to their sexual desires, whereas heterosexual men were. In so far as that was discrimination, the majority thought it was not the sort of discrimination which was prohibited by section 23 of the Constitution. The majority further expressed the opinion that the argument that the discrimination arose from the fact that men who performed that act with women were not penalised, although technically correct, lacked common sense and real substance. It added that the law had properly decided that it was unrealistic to try to penalise such conduct between a man and a woman. This did not lead to a conclusion that the law was discriminating when such conduct took place between men. The real discrimination was against homosexual men in favour of heterosexual men, which was not discrimination on grounds of gender [emphasis added]. Consequently, the majority concluded that the criminalisation of consensual sodomy was not discrimination under the Constitution and even if that was the case, the law in question would stand the constitutional test of whether it was 'not shown to be reasonably justifiable in a democratic society'. The appellant's conviction was therefore upheld.⁴⁰

⁴⁰ Quansah EK, *Same-sex relationships in Botswana: Current perspectives and future prospects*, (2004) 4 AHRLJ, 201, at 213 – 214.

From his reading of the Banana case, Prof. Douglas Sanders notes Justice McNally's reference to the US Supreme Court as "perhaps the most senior court in the western world". Justice McNally states that *Romer v. Evans* did not overrule *Bowers v. Hardwick* (the US case of 1986 that rejected the constitutional challenge to Georgia sodomy law).⁴¹ Obviously unknown to Justice McNally at the time (in 2000), *Bowers v. Hardwick* was in fact overruled not too long after, in 2003, by *Lawrence*. Justice O'Conner, in *Lawrence* states that the Texas law is in violation of the Equal Protection Clause because banning "deviate sexual intercourse" between consenting adults of the same sex, but not between consenting adults of different sexes, is unconstitutional.⁴²

⁴¹ *Supra*, 39.

⁴² *Lawrence v. Texas*, *Supra*, 27, O'Conner, J., concurring in the judgment.

Another relevant case was decided in 2003: *Utjiwa Kanane v. The State* in Botswana (hereinafter *Kanane*).⁴³ Botswana being a member of the Commonwealth, this case has particular relevance. Following excerpts (again from EK Quansah's article) summarise the *Kanane* case.

⁴³ Criminal Appeal No 9 of 2003 (30 July 2003) unreported. Cited from Quansah, EK, *Supra*, 40.

In March 1995, the appellant was brought before the Magistrate's Court and charged with the commission of two offences, namely committing an 'unnatural offence, contrary to section 164(c) of the Penal Code', and committing 'indecent practices between males, contrary to section 167 as read with section 33 of the Penal Code'. [...] The appellant pleaded not guilty to both charges and averred that the sections of the Penal Code [...] were ultra vires section 3 of the Botswana Constitution. It was common cause that this averment raised a constitutional issue, which ought to be determined by the High Court before the trial could proceed. The essence of the appellant's contentions in the High Court was that the stated sections of the Penal Code, (a) discriminate against male persons on the ground of gender and offend against their right of freedom of conscience, of expression and of privacy, assembly and association entrenched in section 3 of the Constitution, and thus contravened that section; and, (b) hinder male persons as contained in sections 13 and 15 of the

⁴⁴ Section 13 provides for the protection of freedom of assembly and association; Section 15 provides for, *inter alia*, protection from discrimination on the grounds of race, tribe, place of origin, political opinions, colour or creed.

⁴⁵ See Crim Trial No F94/1995 (22 March 2002) unreported. Cited from Quansah, EK, *Supra*, 40.

Constitution by discriminating against males on the basis of their gender and thus contravened those sections.⁴⁴

[...]

Mwaikasu J, in a lengthy and detailed judgment,⁴⁵ held that the sections of the Penal Code complained of did not violate any of the provisions of the Constitution and were in accordance with them. The learned judge was of the view that the application essentially concerns the place and extent of public morality or moral values in the criminal law of a given society. In his view, the criminal law has as its basis the public morality or moral values or norms as cherished by members of the society concerned, and is influenced by the culture of the moment of such society. Such moral values regulate the conduct of individual members of society for the good of society and provide a conducive environment for the exercise and enjoyment of the individual rights and freedoms of members of such society. He added that the conduct of any person that is seen to threaten the fabric of a given society is what falls to be proscribed under the criminal law of the society concerned. In this regard, the identification of any such moral values or norms as being of importance to the welfare of society as a whole and for the promotion of the dignity, rights and freedoms of its members is the preserve of the society concerned.

[...]

Tebbutt JP, who gave the lead judgment of the Court of Appeal, [...] it was his view [Tebbutt JP] that the Court should adopt a broad and generous approach to the construction of the Constitution [...] he held that discriminatory legislation on the basis of gender, though not expressly mentioned in section 15(3) of the Constitution, would violate section 3 of the Constitution. [...] Consequently, section 167 of the Penal Code, with which the appellant was charged, was clearly discriminatory on the basis of gender, either in itself or in its effect. The section was aimed entirely at male persons who committed acts of gross indecency with one another, be it in public or in private. [...] With regard to section 164(c) as it

*stood before the 1998 amendment, it was his view that it did not discriminate on the basis of gender. As the person who commits the stipulated offence may be either male or female, the allegation that it is discriminative in nature failed.*⁴⁶

⁴⁶ Quansah EK, *Supra*, 40, at 202 – 206.

Both cases, *Banana* and *Kanane* illustrate the reluctance of judicial courts to accept discrimination in the context of laws that are facially neutral, but similar such arguments have in fact been upheld by other judicial courts. For example, the Fijian judgment, *McCoskar* notes that “while technically the provisions of Section 175 are not anti homosexual nonetheless they proscribe criminal conduct essential to the sexual expression of the homosexual relationship and are perceived as such.” The judgment declares the distinctions created by – the facially neutral – Section 175(a) and (c) of the Fijian Penal Code as discriminatory against homosexuals and accordingly invalid.

In the context of equality, another judgment to make note of is *Leung T C William Roy v. Secretary for Justice* (hereinafter *Leung*) which struck down unequal ages of consent.⁴⁷ The law in Hong Kong provided for 21 years as the minimum age for sexual activity between men whereas the corresponding age for sexual activity between men and women was 16. This was held to be discriminatory. *Leung* found no justification “for the different treatment of male homosexuals compared with heterosexuals.”⁴⁸

⁴⁷ CACV No. 317 of 2005 (Date of Handing Down Judgment: 20 September 2006). Available on line: http://legalref.judiciary.gov.hk/lrs/common/ju/ju_body.jsp?DIS=54227&AH=&QS=&FN=&currpage=

⁴⁸ *Ibid*, at Para 51 (6).

The judicial application of human rights to the criminalisation of same-sex sexual acts is thus scattered and varied. While *Dudgeon*, *Norris*, *Modinos*, *Wasson*, *Toonen*, the *National Coalition* case, *Lawrence*, and *McCoskar* struck down their respective criminalisation as unconstitutional, *Banana*, and *Kanane* failed to do so. There are nuanced analyses of each of these cases which this paper does not go into.

A welcome new development is the formulation of the Yogyakarta Principles which brings together the principles of international

human rights law that apply to sexual orientation and gender identity. In response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, Indonesia in 2006. The result was the Yogyakarta Principles: a universal guide to human rights which affirm binding international legal standards with which all States must comply.⁴⁹ The Yogyakarta Principles acknowledge human rights violations caused by the criminalisation, and state (in Principle 6: the right to privacy) that all laws that criminalise consensual sexual activity among persons of the same sex who are over the age of consent be repealed.⁵⁰

⁴⁹ <http://www.yogyakartaprinciples.org/index.html>

⁵⁰ http://www.yogyakartaprinciples.org/principles_en.htm

III

THE COMMONWEALTH & THE UNITED KINGDOM (UK)

The Commonwealth is an association of 53 countries: Antigua and Barbuda, Australia, The Bahamas, Bangladesh, Barbados, Belize, Botswana, Brunei Darussalam, Cameroon, Canada, Cyprus, Dominica, *Fiji Islands, The Gambia, Ghana, Grenada, Guyana, India, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Maldives, Malta, Mauritius, Mozambique, Namibia, **Nauru, New Zealand, Nigeria, Pakistan, Papua New Guinea, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Samoa, Seychelles, Sierra Leone, Singapore, Solomon Islands, South Africa, Sri Lanka, Swaziland, Tonga, Trinidad and Tobago, Tuvalu, Uganda, United Kingdom, United Republic of Tanzania, Vanuatu, and Zambia.⁵¹

There are nearly 2 billion people in the Commonwealth, about 30 per cent of the world's population.⁵² All of the member states, except for Mozambique, have experienced direct or indirect British rule, or have been linked administratively to another Commonwealth country. The Commonwealth provides its members with developmental support and collaboration. The fact that it is a 'family' of nations which have a common heritage in many fields, including a common language, enables them to work together.⁵³

Human rights have long been at the centre of the Commonwealth's values and its practical interventions.⁵⁴ Promotion of human rights is one of the fundamental objectives of the Commonwealth.⁵⁵

The Commonwealth Heads of Government Meeting (CHOGM) occurs once every two years. The last CHOGM was held in Uganda in 2007. Before CHOGM 2007, Sexual Minorities Uganda (SMUG) and the International Gay and Lesbian Human Rights

⁵¹ As of Mar 2008 *Fiji Islands was suspended from the Councils of the Commonwealth in December 2006 following a military coup; **Nauru is a Member in Arrears. <http://www.thecommonwealth.org/Internal/142227/members/>

⁵² <http://www.thecommonwealth.org/>

⁵³ <http://www.thecommonwealth.org/FAQs/20706/faqs/>

⁵⁴ <http://www.thecommonwealth.org/subhomepage/39419/>

⁵⁵ http://www.thecommonwealth.org/Internal/39419/153665/mainstreaming_human_rights/

Commission (IGLHRC) wrote a letter to the Commonwealth Secretariat requesting it to “appeal to all Commonwealth nations that maintain criminal penalties for homosexuality to repeal such laws”.⁵⁶ An excerpt follows:

⁵⁶ <http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=803>

The final article of the Singapore Declaration, issued on 22 January, 1971, at the conclusion of the first CHOGM, states that the organization will, “assist in the elimination of discrimination based on differences of race, colour or creed, maintain and strengthen personal liberty, contribute to the enrichment of life for all, and provide a powerful influence for peace among nations.” The Harare Declaration, issued on 20 October, 1991, during the twelfth CHOGM, goes on to say that the Commonwealth, “believe(s) in the liberty of the individual under the law, in equal rights for all citizens regardless of gender, race, colour, creed or political belief, and in the individual’s inalienable right to participate by means of free and democratic political processes in framing the society in which he or she lives.”

Many of the Commonwealth nations have actualized these aspirations by abolishing antiquated laws criminalizing consensual same-sex acts, recognizing that each and every one of us, regardless of sexual orientation or gender identity, has a right to live a full life, free from arbitrary arrest and detention, discrimination and social stigma. This is in keeping with both the decisions of the United Nations Human Rights Committee and the UN Working Group on Arbitrary Detention, which have determined that arrests based on laws criminalizing homosexuality are arbitrary and unfair and constitute violations of the rights to privacy and equality.

Unfortunately, too many Commonwealth states maintain laws criminalizing homosexuality—including most of the countries of the Caribbean and more than two-thirds of African nations. India, the most populous Commonwealth state, continues to penalize homosexuality under Article 377 of its criminal code. In four African countries, including Nigeria, consensual homosexual acts are still punishable by death.

These statutes create a climate of fear for LGBT people and offer official justification for homophobic hatred and violence. In addition to unfair imprisonment, anti-homosexuality laws are used to deny access to employment, education, health care, and housing, and form the basis of extortion and blackmail claims. In the most extreme cases, same-sex practicing people have been subjected to physical abuse and executions.

The Commonwealth is committed to fighting HIV/AIDS.⁵⁷ Certain sexual acts like anal sex are steeped in stigma and shame. The stigma is compounded manifold by its criminalisation. In particular the criminalisation undermines the self-esteem of same sex desiring people, who are left grappling with their sexuality on the one hand and criminality on the other. The criminalisation is a major obstacle to reaching out to those who come within its ambit. It pushes them into hiding and even targets those who attempt to reach out to them. The arrest of NGO staff working on HIV/AIDS awareness amidst MSM in Lucknow, India in 2001 is an example.

Even the UNAIDS recommends “removal of legal barriers to access prevention and care, such as laws that criminalize sex between males” as an HIV-prevention measure for MSM and transgendered people.⁵⁸

The ILGA 2008 report states that no less than 86 member states of the UN criminalise consensual same-sex acts.⁵⁹ Of these, nearly 50% (as many as 41) are in the Commonwealth. Within the Commonwealth, 41 out of 53 countries makes it 77%. It

⁵⁷ http://www.thecommonwealth.org/Internal/166024/34041/hiv_aids/

⁵⁸ *Guidance for Applicants to the Global fund to Fight AIDS, TB and Malaria Round 8 Call for proposals*, UNAIDS, 28 February 2008, p. 4; available on line: http://data.unaids.org/pub/BaseDocument/2008/20080228_rd8_sexualminorities_en.pdf

⁵⁹ *Supra*, 1.

⁶⁰ *Supra*, 2.

is worth noting that this percentage is much lower within the UN – 86 out of 192 countries makes it 45%. It is even lower in the non-Commonwealth UN, 32%.⁶⁰ These statistics show that sodomy laws exist in a larger part of the Commonwealth (77%) than the non-Commonwealth (32%).

In the South and Southeast Asia, of the set of countries presently under consideration, all except Bhutan, Myanmar and Nepal are members of the Commonwealth. That means eight countries in the region share a common forum – the Commonwealth – for mobilising international dialogue on the subject.

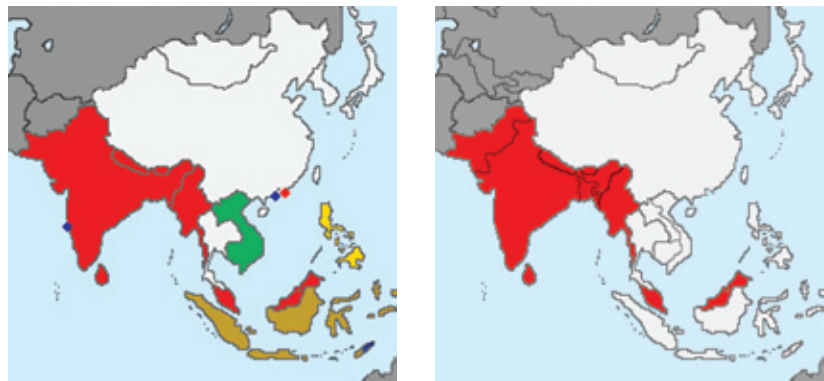
The criminalisation is a direct reflection of Victorian period law-making in what was then the British Empire. The British buggery law was reformulated as ‘unnatural’ intercourse in the Indian Penal Code of 1860. In this revised form it travelled around the world.⁶¹ Ironically the penalisation has long ceased to exist in the place of its origin (United Kingdom) but it continues to flourish in former British colonies.

⁶¹ Sanders D, *377 - and the unnatural afterlife of British colonialism*, unpublished, to be presented at the 5th Asian Law Institute Conference, National University of Singapore, May 22 and 23, 2008, p. 7.

⁶² http://www.yawningbread.org/arch_2004/yax-350.htm (as accessed on 7 Feb. 2008.)

Disclaimer: The image may not be entirely accurate in its depiction of international boundaries. The South and Southeast Asia Resource Centre on Sexuality, TARSHI, its directors and employees do not own any responsibility for the correctness or authenticity of the image.

⁶³ The other coloured areas are: Green: French Indochina (today's Vietnam, Laos and Cambodia); Olive: Dutch East Indies (today's Indonesia); Yellow: Spanish colony, then American after 1898 (today it is the Philippines); Dark blue: Portuguese (today Goa is a part of India, Macao handed back to China and East Timor is independent). *Ibid.*



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The map on the left is from 1924. The red parts show the former British dominions.⁶³ The map on the right shows countries that presently have laws that criminalise consensual sexual activity between persons of the same sex. The red areas are almost identical in both maps. This gives a visual picture of the commonality between the British colonisation (map on left) and the criminalisation (map on right).

Following is a quote from a draft paper by Prof. Robert Wintemute, School of Law, Kings College London, UK:

Environmental lawyers are familiar with the idea of an obligation on corporations to clean up toxic waste they have left behind on land they have used. During the British Empire, the British travelled around the Empire dropping “toxic legal waste” in every country they conquered, in the form of laws against anal intercourse (derived from Christian religious law) or against all sexual activity between men. (One can imagine an elephant leaving large steaming piles of waste behind it!) In many of these countries, no such laws would ever have been passed, but for the British invasion. Unfortunately, Britain’s “toxic legal waste” is still harming the social environment...⁶⁴

⁶⁴ Wintemute R, Draft of *Lesbian and Gay Human Rights in India: International and Comparative Perspectives* to be submitted to an Indian law journal in 2008.

The Foreign and Commonwealth Office (FCO) sets UK’s ‘international priorities’, one of which is ‘promoting sustainable development and poverty reduction underpinned by human rights, democracy, good governance and protection of the environment’. Within its ‘key thematic issues’ for human rights, the FCO places emphasis on equality.

On sexual orientation, the FCO states:⁶⁵

The UK is committed to working for an end to discrimination on the grounds of sexual orientation. Such discrimination is prohibited by international human rights law. Article 26 of the International Covenant on Civil and Political Rights prohibits discrimination “on any ground”. Article 17 of the covenant also provides that no-one shall be subjected to “arbitrary or unlawful interference” with his privacy, family, home or correspondence. A similar provision is contained in Article 8 of the European Convention on Human rights, which provides that everyone has the right to respect for his private and family life, his home and correspondence.

⁶⁵ <http://www.fco.gov.uk/servlet/ Front?pagename=OpenMarket/ Xcelerate/ShowPage&c=Page&cid=1 028302591889>

On 17th May 2007, the International Day Against Homophobia

(IDAHO), in an unprecedented statement the British Foreign Office Minister Ian McCartney affirmed “Britain’s commitment to the universal decriminalisation of homosexuality” in the following words:⁶⁶

⁶⁶ <http://www.fco.gov.uk/servlet/ServletFront?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391629&a=KArticle&aid=1179390975119&year=2007&month=2007-05-01>

We have taken a lead in ending discrimination against lesbian, gay, bisexual and transgender (LGBT) people in the UK. But elsewhere the picture remains bleak. More than 70 countries totally prohibit consenting same-sex relations, and nine countries punish them with death, denying people their basic human rights. Every year hundreds of LGBT people are killed simply because of their sexual orientation. Some by State execution; many more while the State looks on indifferently. Many thousands more live in fear of persecution. Human rights belong to everyone. Sexual orientation cannot be a qualifying factor.

The Foreign and Commonwealth [Office] is developing a strategy for promoting and protecting the human rights of LGBT people overseas. This year sees the 40th Anniversary of the Sexual Offences Act in the UK, which began the decriminalisation of homosexuality. We can mark this milestone by speaking up for those millions around the world who are branded as criminals simply for being who they are. I look forward to working in partnership with NGOs and other stakeholders to develop our strategy.

LGBT people have struggled to gain recognition of their human rights internationally. Many states refuse even to consider these issues and strive to keep them off the international agenda. Millions of our fellow human beings live in societies still blighted by stigma, prejudice and shame. Their suffering is unseen and unheard. These will be difficult issues to raise, but we must speak up for those who cannot speak up for themselves.

In an addition to efforts on decriminalisation, the statement published on the FCO website states 5 other areas where UK action can make a difference:

- *non-discrimination in the application of human rights;*
- *support for LGBT activists and human rights defenders;*
- *health and health education;*
- *raising LGBT issues at international / multilateral institutions;*
- *and bilateral engagement with key countries.*

Well intended as it may be, any intervention from the UK would have to take into consideration postcolonial sentiments.

*The attempt to persuade must be very sensitive and diplomatic, acknowledging the suffering of these countries under British imperialism, their independence, and their right (subject to the requirements of their own constitutions and international human rights law) to say to Britain: “Your views were forced on us for hundreds of years. We refuse to listen to you now.” What Britain can say now is: “We made a mistake. We should never have passed laws against ‘buggery’ or ‘gross indecency’ in our own country, let alone export them to the entire British Empire. We belatedly realised our mistake and repealed the laws in England and Wales in 1967, and in Scotland in 1980. In 1981, the European Court of Human Rights ordered us to change the laws in Northern Ireland. We did so in 1982. The United Nations Human Rights Committee decided in 1994 that every country that is a party to the International Covenant on Civil and Political Rights should repeal laws of this kind. We apologise for our mistake in exporting harmful laws to your country, and urge you to comply with the Covenant by repealing these laws.”*⁶⁷

⁶⁷ *Supra*, 64.

CONCLUSION

The Commonwealth and the UK each bears a promising potential for undoing the criminalisation, not just in countries in this region but the world over. There are a number of countries in Africa for instance that – like countries in this region – have in common the criminalisation, their membership to the Commonwealth and a shared history of British colonisation.

We need to bear in mind that there may not be ready willingness on the part of the Commonwealth and the UK to make any interventions on this count. Conservative political views within would resist the very idea of decriminalisation; or a cautious international diplomacy might keep them both from stirring up a hornet's nest.

We also need to bear in mind the socio-political opposition to the decriminalisation in some countries. For example, before the CHOGM 2007 Members of Parliament in Uganda were reported to have urged the country's government to speak against gay rights.⁶⁸ Queen Elizabeth II's arrival in Kampala ahead of the CHOGM summit was reported to have been marked by demonstrations by anti-gay activists.⁶⁹ Human rights defenders, including representatives from SMUG who were scheduled to give their addresses at the CHOGM Speaker's Corner were forcibly thrown out of the People's Space by the Ugandan police.⁷⁰

Any intervention for the defense of human rights internationally will have to be mindful of prevailing socio-political factors. Only after examining the prejudice and resistance on the ground can one make an assessment of how the intervention is to be made, or indeed if at all it is to be made. There might be countries for instance in which the criminalisation may not be as big a

⁶⁸ *Commonwealth meeting could promote homophobia*, Pinknews, Nov 2, 2007, <http://pinknews.co.uk/news/articles/2005-5940.html>

⁶⁹ *Protests mar Queen's Uganda arrival*, Reuters, Nov 23, 2007, <http://www.reuters.com/news/video?videoid=71332&videoChannel=1>

⁷⁰ *LGBT rights' defenders prevented from taking the floor at the CHOGM in Kampala*, Nov 28, 2007, <http://www.fidh.org/spip.php?article4948>

concern as religion or perhaps public morality or family values. An obscure piece of legislation like this might be lying unnoticed. People who would have been affected by it might be blissfully unaware. An initiative that draws attention to it could then be like waking up a sleeping lion. It could end up drawing attention to the zone of criminality which was till now dormant.

Also bear in mind the common rhetoric in Asia, that homosexuality is a Western anomaly. An intervention rooted in the Commonwealth or the UK bears the risk of being branded a ‘Western agenda’.

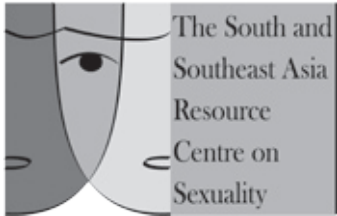
Interventions therefore need to be strategised carefully in close association with human rights defenders on the ground. A beginning could be made by identifying organisations and people in the region who are working on or otherwise involved with human rights issues: scholars, activists, NGOs, government, international agencies, etc. Even those who are not directly involved could offer useful inputs or play significant roles in the future. This would be useful for building local and regional networks.

It would also be useful to have documentation of human rights violations. Cases from the region, of the nature for example of the arrests in Lucknow, India in 2001 would be well worth documenting. As many or as little as 5 cases a year from each country would be useful for informing the media, the civil society, and the government, of the ill effects of the criminalisation.

There needs to be greater demand and targeted lobbying to trigger the potential that the Commonwealth and the UK each bears (for undoing the criminalisation) into action.

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THE SOUTH AND SOUTHEAST ASIA RESOURCE CENTRE ON SEXUALITY



The South and Southeast Asia Resource Centre on Sexuality is hosted by TARSHI (Talking About Reproductive and Sexual Health Issues) in New Delhi, India. TARSHI is an NGO that believes that all people have a right to sexual wellbeing and a self-affirming and enjoyable sexuality. The Resource Centre aims to increase knowledge and scholarship on issues of sexuality, sexual health and sexual well being in this region. It specifically focuses on sexuality related work in China, India, Indonesia, Nepal, Sri Lanka, Thailand, The Philippines, and Vietnam. The Resource Centre is part of the Ford Foundation's Global Dialogue on Sexual Health and Wellbeing. Similar centres are based in Africa, Latin America and North America.

The Resource Centre has a range of programmes to enhance scholarship, increase access to information, and further dialogue on sexuality issues. Our library houses over 3000 books and material on sexuality. Check out our website (www.asiasrc.org). It hosts news and announcements from the region, links to resources on sexuality, an electronic version of our quarterly publication *In Plainspeak*, the library catalogue, and information on our programmes and events.

The South and Southeast Asia Resource Centre on Sexuality
TARSHI
11 Mathura Road, 1st Floor, Jangpura B
New Delhi 110 014, India